

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS N. BALL, SR.,

Plaintiff,

No. C11-5966 BHS/KLS

V.

ORDER TO AMEND OR SHOW CAUSE

DEPARTMENT OF CORRECTIONS and
STATE OF WASHINGTON,

Defendants.

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff has been granted leave to proceed *in forma pauperis*. Presently before the Court for review is Plaintiff's proposed civil rights complaint. ECF No. 6. The Court will not direct service of Plaintiff's complaint at this time because it is deficient, as is explained in further detail below. Plaintiff will be given an opportunity to amend his complaint.

DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

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1 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
2 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
3 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
5 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
6 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
7 to relief above the speculative level, on the assumption that all the allegations in the complaint
8 are true.” *See Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted).
9 In other words, failure to present enough facts to state a claim for relief that is plausible on the
10 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

12 Although complaints are to be liberally construed in a plaintiff’s favor, conclusory
13 allegations of the law, unsupported conclusions, and unwarranted inferences need not be
14 accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply
15 essential facts that an inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of*
16 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Unless it is absolutely clear that
17 amendment would be futile, however, a pro se litigant must be given the opportunity to amend
18 his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

20 Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, “the complaint [must
21 provide] ‘the defendant fair notice of what the plaintiff’s claim is and the ground upon which it
22 rests.’” *Kimes v. Stone* 84 F.3d 1121, 1129 (9th Cir. 1996) (citations omitted). In addition, in
23 order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must prove that the
24 particular defendant has caused or personally participated in causing the deprivation of a
25 particular protected constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

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1 To be liable for “causing” the deprivation of a constitutional right, the particular defendant must
2 commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and
3 which causes the plaintiff’s deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

4 Plaintiff claims that on May 10, 2011, he was injured in the kitchen at the Washington
5 Correction Center when he fell through a broken grate and tile in the kitchen floor. ECF No. 7 at
6 3. He was rendered unconscious. Medical staff placed him in a neck brace and he was taken to a
7 hospital approximately forty minutes later. He claims that there had been multiple work orders
8 turned in to fix the problem with the floor grates and tiles. Plaintiff seeks \$85,000.00 for
9 “negligence and malpractice” against the Department of Corrections and State of Washington.

10 *Id.* at 4.

11 However, neither negligence nor gross negligence is actionable under § 1983 in the
12 prison context. *Farmer v. Brennan*, 511 U.S. 825, 835-36 & n.4, 114 S.Ct. 1970, 128 L.Ed.2d
13 811 (1994). And medical malpractice does not become a constitutional violation merely
14 because the victim is a prisoner. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also Lopez v.*
15 *Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc); *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th
16 Cir. 1998) (9th Cir. 1998). To state a cause of action under § 1983, Plaintiff must allege that (1)
17 the named Defendants deprived him of a right secured by the Constitution or laws of the United
18 States and (2) that, in doing so, the Defendants acted under color of state law. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-57, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

22 As to any claim related to his medical treatment, Plaintiff must include factual allegations
23 that a state actor acted with deliberate indifference to his serious medical needs. Deliberate
24 indifference to an inmate’s serious medical needs violates the Eighth Amendment’s proscription
25 against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Deliberate
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1 indifference includes denial, delay or intentional interference with a prisoner's medical
2 treatment. *Id.* at 104-5; see also *Broughton v. Cutter Labs.*, 622 F.2d 458, 459-60 (9th Cir.
3 1980). To succeed on a deliberate indifference claim, an inmate must demonstrate that the
4 prison official had a sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 836
5 (1994). A determination of deliberate indifference involves an examination of two elements: the
6 seriousness of the prisoner's medical need and the nature of the defendant's response to that
7 need. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992).

9 First, the alleged deprivation must be, objectively, "sufficiently serious." *Farmer*, 511
10 U.S. at 834. A "serious medical need" exists if the failure to treat a prisoner's condition would
11 result in further significant injury or the unnecessary and wanton infliction of pain contrary to
12 contemporary standards of decency. *Helling v. McKinney*, 509 U.S. 25, 32-35 (1993);
13 *McGuckin*, 974 F.2d at 1059. Second, the prison official must be deliberately indifferent to the
14 risk of harm to the inmate. *Farmer*, 511 U.S. at 834. An official is deliberately indifferent to a
15 serious medical need if the official "knows of and disregards an excessive risk to inmate health
16 or safety." *Id.* at 837.

18 As to any claim related to the condition of the kitchen floor, Plaintiff must include factual
19 allegations that the prison officials knew of an objectively serious risk of harm and acted with
20 deliberate indifference to it. See *Farmer v. Brennan*, 511 U.S. 825, 833, 114 S.Ct. 1970, 128
21 L.Ed.2d 811 (1994); *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.1986). Here, Plaintiff states
22 only that there were "multiple work orders" to fix the problem with the grates and tiles, but he
23 has provided no further facts describing the risk of harm.

1 In addition, Plaintiff has not sued the proper parties. Plaintiff must set forth facts
2 describing when, where and how *individually* named defendants deprived him of a constitutional
3 right. Plaintiff must allege with specificity the names of the individual persons who caused or
4 personally participated in causing the alleged deprivation of his constitutional rights and what
5 they have done or failed to do that resulted in the deprivation of his constitutional rights.
6 Section 1983 authorizes assertion of a claim for relief against a “person” who acted under color
7 of state law. A suable §1983 “person” encompasses state and local officials sued in their
8 personal capacities, municipal entities, and municipal officials sued in an official capacity. *Will*
9 *v. Michigan Department of State Police*, 491 U.S. 58 (1989). The “Department of Corrections”
10 is not a “person” for purposes of a section 1983 civil rights action. Also, the State of
11 Washington is not a proper party because it is well-established that the Eleventh Amendment
12 affords non-consenting states constitutional immunity from suit in both federal and state courts.
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14 *See, e.g., Alden v. Maine*, 527 U.S. 706, 748 (1999); *Will v. Mich. Dep’t of State Police*, 491 U.S.
15 58, 70-71 (1989); *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996). Accordingly,
16 Plaintiff may not sue the Department of Corrections or Washington State, but must name the
17 individuals who harmed him.

19 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff
20 may file an amended complaint curing, if possible, the above noted deficiencies, or show cause
21 explaining why this matter should not be dismissed no later than **January 13, 2012**. If Plaintiff
22 chooses to amend his complaint, he must demonstrate how the conditions complained of have
23 resulted in a deprivation of his constitutional rights. The complaint must allege in specific terms
24 how each named defendant is involved. The amended complaint must set forth all of Plaintiff’s
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1 factual claims, causes of action, and claims for relief. Plaintiff shall set forth his factual
2 allegations **in separately numbered paragraphs** and shall allege with specificity the following:

3 (1) the names of the persons who caused or personally participated in causing the
4 alleged deprivation of his constitutional rights;

5 (2) the dates on which the conduct of each Defendant allegedly took place; and
6 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

7 An amended complaint operates as a complete substitute for (rather than a mere
8 supplement to) the present complaint. In other words, an amended complaint supersedes the
9 original in its entirety, making the original as if it never existed. Therefore, reference to a prior
10 pleading or another document is unacceptable – once Plaintiff files an amended complaint, the
11 original pleading or pleadings will no longer serve any function in this case. *See Loux v. Rhay*,
12 375 F.2d 55, 57 (9th Cir. 1967) (as a general rule, an amended complaint supersedes the prior
13 complaint). Therefore, in an amended complaint, as in an original complaint, each claim and the
14 involvement of each defendant must be sufficiently alleged.

15 Plaintiff shall present his complaint on the form provided by the court. The amended
16 complaint must be **legibly rewritten or retyped in its entirety**, it should be an original and not a
17 copy, it may not incorporate any part of the original complaint by reference, and it must be
18 clearly labeled the “Amended Complaint” and must contain the same cause number as this case.
19 Plaintiff should complete all sections of the court’s form. Plaintiff may attach continuation
20 pages as needed but may not attach a separate document that purports to be his amended
21 complaint. **Plaintiff is advised that he should make a short and plain statement of claims**
22 **against the defendants. He may do so by listing his complaints in separately numbered**
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1 paragraphs. He should include facts explaining how each defendant was involved in the
2 denial of his rights.

3 The Court will screen the amended complaint to determine whether it contains factual
4 allegations linking each defendant to the alleged violations of Plaintiff's rights. The Court will
5 not authorize service of the amended complaint on any Defendant who is not specifically linked
6 to the violation of Plaintiff's rights.
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8 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned
9 that if the amended complaint is not timely filed or if he fails to adequately address the issues
10 raised herein on or before **January 13, 2012**, the Court will recommend dismissal of this action
11 as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a "strike" under 28
12 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
13 brings three or more civil actions or appeals which are dismissed on grounds they are legally
14 frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil
15 action or appeal in forma pauperis "unless the prisoner is under imminent danger of serious
16 physical injury." 28 U.S.C. § 1915(g). **The Clerk is directed to send Plaintiff the**
17 **appropriate forms for filing a 42 U.S.C. 1983 civil rights complaint and for service. The**
18 **Clerk is further directed to send a copy of this Order and a copy of the General Order to**
19 **Plaintiff.**

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21 **DATED** this 12th day of December, 2011.
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24 Karen L. Strombom
25 United States Magistrate Judge
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